STATE OF MAINE

Board of Overseers of the Bar
Grievance Commission File
No. GV-91-S-277

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| BOARD OF OVERSEERS OF THE BAR | * | |
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| PETITIONER | * | |
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| VS. | * | REPORT OF PROCEEDINGS, |
| | * | FINDINGS AND CONCLUSIONS |
| NEIL SHANKMAN, ESQ. | * | |
| | * | |
| RESPONDENT | * | |

This matter came before Panel A of the Grievance Commission for a hearing open to the public on December 21, 1992 at the Probate Courtroom in Bangor. The Board of Overseers of the Bar was represented by Geoffrey S. Welsh, Esq., Assistant Bar counsel. The respondent Neil Shankman was present and represented by Peter DeTroy, Esq. For this hearing Panel A was comprised of John P. Foster, Esq., Chairman, Susan R. Kominsky, Esq. and Craig A. McEwen.

Summary of Proceedings and Evidence

As preliminary matters the panel admitted Board Exhibits 1 and 2 by stipulation, which were the complaint letter and the response letter. Mr. Detroy asked the panel to disregard a pre-hearing "memorandum of law" submitted by Mr. Welsh to the panel on the day prior to the hearing. The panel agreed that it would disregard the memorandum except to consider it subsequent to the hearing as argument.

Mr. Welsh presented the case for the Board of Overseers and called two witnesses, Gina Bicknell, the complainant, and Neil Shankman, the respondent, both of whom were sworn. Mr. DeTroy

cross-examined both witnesses but called no witnesses of his own. After the testimony, both counsel made closing arguments to the panel.

Ms. Bicknell testified that she and her husband had engaged Mr. Shankman to help them work through financial difficulties and to file a bankruptcy petition. The Bicknells initially met together with Mr. Shankman in his Brunswick office on September 20, 1991 and reviewed materials regarding the bankruptcy petition. At the close of the September 20th meeting they agreed to meet again on September 27th. Ms. Bicknell described Mr. Shankman's behavior as professional and serious during the first sixty minute meeting.

Scheduling difficulties prompted Ms. Bicknell to reschedule the September 27, 1991 meeting by phone with Mr. Shankman's secretary, setting it for later in the day at 5:00 p.m. As it turned out, her husband could not attend even at that later hour. Ms. Bicknell came alone to Mr. Shankman's office in Brunswick and found an empty waiting room with no receptionist present. At about 5:00 p.m., Mr. Shankman called her into his office, indicating that his secretary had made an early departure to care for a sick child.

The meeting proceeded professionally with a review of the bankruptcy forms and the Bicknells' plans to move out of state to Florida. Ms. Bicknell testified that the business discussion was finished about 5:30 or 5:40 p.m., at which time she asked: "Is there anything else that I need to do?" Mr. Shankman's quick response was "Why don't you take your clothes off, and we'll talk about it?"

Ms. Bicknell testified that she was shocked by this statement and that her immediate response was fear. She started thinking

about how to get out of his office, which was on the fifth floor of the building. In her estimation, Mr. Shankman was not joking in making this remark. Instead, she testified, "I thought he was coming on to me." She reported that she looked at Mr. Shankman for a reaction and only got eye contact and silence. At that point, she told Mr. Shankman that she or her husband would be getting back to him, gathered her materials, and left the office.

On Monday, September 30, 1991, Mr. and Ms. Bicknell returned to Mr. Shankman's office and met him in passing on the stairs at 11:30 a.m. Mr. Shankman agreed to meet them at about 1:00 p.m. that afternoon. At that meeting Mr. Bicknell confronted Mr. Shankman with his remark and threatened Mr. Shankman with bodily harm. (Mr. Bicknell was employed as a security officer and martial arts instructor.) Mr. Shankman held his face in his hands for several seconds after Mr. Bicknell's accusation, then apologized and indicated that "he meant no offense." Upon the Bicknells' request, Mr. Shankman returned the retainer, and the Bicknells gathered their documents and left the office. Subsequently, they chose not to pursue bankruptcy and did not contact another lawyer.

Mr. Shankman testified that Ms. Bicknell's account of events was essentially accurate, but he differed on two points. First, he recalled that the Friday, September 20, meeting was a two-part meeting, and that it was at the conclusion of the first part -- not at the conclusion of the meeting as a whole -- that his remark was made. He recalled a continuing discussion of substantive issues after the remark had been made. Second, he indicated that, although in retrospect he understands fully Ms. Bicknell's interpretation of the remark and its extraordinary insensitivity

and inappropriateness, he intended it as "an offhand, silly remark" to "break the ice." He further testified that his general style was to lighten the tedious and often tension-filled work of counselling clients with light, humorous, off-hand remarks and non-sequiturs.[1] He noted that anxiety and discomfort are particularly common in bankruptcy cases and that this case was no exception.

Mr. Shankman further testified that he was a disciplined workaholic who spent long days at the office but always was home by 5:00 or 5:30 p.m. on Fridays to be with his family to begin a weekend free of work. He reported that he had tried to change the time of this appointment when he learned it had been made so late in the day, but that Ms. Bicknell's schedule did not permit any change.

Mr. Shankman apologized for the insensitivity and thoughtlessness of this comment and indicated his understanding of the pain and anxiety it caused Ms. Bicknell. In the weeks of reflection about this complaint he indicated that he had re-evaluated his sense of humor and realized that any kind of sexual humor with clients might make them uncomfortable. Mr. Shankman strongly asserted that the kind of conduct leading to this complaint would not be repeated.

## Conclusions of Fact and Findings

This first issue before the panel is whether or not Mr. Shankman's comment constitutes "conduct unworthy of an attorney"

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[1] Respondent gave us another example of how he sometimes used to use humor as a way of relieving tension by saying, during a particularly unpleasant conference, "Isn't this the most fun you can have with your clothes on?"

within the meaning of Maine Bar Rule 3.1(a). The panel finds that it was.

The Panel is not required in this case to determine whether all sexual comments or jokes made in the context of the lawyer-client relationship constitute conduct unworthy of an attorney. Nor is it even necessary in this case to declare that such remarks constitute unethical behavior if made in circumstances which cause discomfort or anxiety to the client. Those are difficult issues for another day.

In the pending case the Panel finds that the remark made by Mr. Shankman was not intended as a joke but as a sexual advance. In part we reach this conclusion because of the nature of the remark itself, the fact that it can be characterized as a request for an action to be taken by Ms. Bicknell, as opposed to being merely a humorous observation. In this respect there is substantive difference between the remark in issue and the comment referred to in footnote 1.

Secondly, although Mr. Shankman claims that the remark was a joke that "bombed" and that he then "froze" rather than apologize or explain, the Panel concludes that it is more likely that if the intent had been comic Mr. Shankman would have followed up with some such explanation to Ms. Bicknell. His failure to do so at the time suggests instead his embarrassment at having made an obviously unwelcome suggestion to his client.

Even if we were to give Mr. Shankman extraordinary benefit of the doubt and accept his statement that his intent was to make a joke, the best that could be said about it in the circumstances described was that it was nearly certain to be perceived otherwise

by Ms. Bicknell, as indeed it was. As such, we do not believe that being "intended as a joke" ought to constitute a viable defense.

Finally, we understand it to be the Respondent's position (based on his counsel's closing argument) that he concedes a violation of Rule 3.1(a) even while maintaining that the remark was only intended as a joke. Respondent's primary contention is that the misconduct warrants only the non-disciplinary result of a dismissal with warning rather than the sanction of a reprimand.

The issue of the proper disposition of this matter has been difficult for the Panel. Maine Bar Rule 7.1(d)(4) indicates that given a finding of misconduct, dismissal with warning is warranted if three conditions are met: "that the misconduct is minor; that there is little or no injury to a client, the public, the legal system, or the profession; and that there is little likelihood of repetition by the attorney."

In this case, the third condition presents little problem. Mr. Shankman has persuasively indicated his understanding of the inappropriateness of his behavior. Indeed, Ms. Bicknell's courage in bringing this case forward has apparently shocked Mr. Shankman into serious introspection about his own patterns of behavior and assumptions. It is the panel's judgment that any similar future conduct is highly unlikely.

A more difficult question is whether this conduct was "minor" within the meaning of the Bar Rules. It is the view of the panel that sexual advances by attorneys toward clients may constitute major misconduct but that, like many breaches of rules, such acts can vary substantially in their seriousness. Other cases of sexual advances by lawyers cited by bar counsel have been useful in

allowing us to weigh various criteria that courts have used for judging seriousness. Those criteria include whether there was a pattern of such conduct, either repeated with the same person or with different individuals, whether physical contact accompanied the verbal statements, and whether the situation indicated that the attorney was using a position of power or control to press for sexual favors.

In this case, the comment in question was not accompanied by physical contact. It was an isolated remark without preface or follow-up. No pattern of such conduct either with the complainant or others has been suggested. And, though an argument could be made that Mr. Shankman misused his position as an attorney counselling a client under stress to seek sexual favors, that is not a compelling conclusion in this case. In this instance, therefore, and on a close call, the conduct in question may be considered "minor."

The third part of the dismissal with warning test is whether there was little or no injury (in this case, to the client). It might be argued that injury in this context means harm to the client's legal position, and that there has been no harm to Ms. Bicknell's legal case. Mr. Shankman did promptly return the retainer and no other harm to the Bicknell's legal matter has been shown.

However, the Panel does not construe Rule 7.1(d)(4) so narrowly. The "injury" in this situation was an affront to the client's person, analogous to an assault. While it may be true that some clients would not have been offended by Respondent's words, the reaction of this client was one of fright, and that

reaction was clearly foreseeable. She felt that she was alone in the building with Mr. Shankman, she was young, and she was emotionally and physically vulnerable.[2] The panel finds that Ms. Bicknell was indeed frightened by Mr. Shankman's conduct. Under these circumstances, the panel cannot conclude that there was "little or no injury" to the Complainant. Therefore a dismissal with warning is not appropriate.

As a result of the foregoing, the panel concludes that a reprimand is warranted, and Respondent is hereby reprimanded.

John P. Foster

Susan R. Kominsky

Craig A. McEwen

Dated: 2/19/93

[2] Under the ABA Standards For Imposing Lawyer Sanctions, the vulnerability of the victim is considered an aggravating factor in deciding what sanction to impose. [1991 Edition, §9.2]